

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

----

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY SAMUEL FULSOM,

Defendant and Appellant.

C061704

(Super. Ct. Nos.  
08F04907, 08F01250,  
06M12710)

Defendant Anthony Samuel Fulsom was placed on probation in three separate cases. The trial court subsequently sustained allegations that he violated his probation in each of the three cases, sentenced him to an aggregate term of four years in state prison, awarded presentence custody credits and imposed various fees and fines, including restitution fines in addition to those previously imposed.

On appeal, defendant contends (1) the additional restitution fines are unauthorized, (2) presentence custody credits for time spent in custody pending the probation revocation hearing should have been applied to all three cases

rather than just the misdemeanor case alone, and (3) although defendant pleaded no contest to a non-strike felony under Penal Code section 245, subdivision (a)(1),<sup>1</sup> the abstract of judgment incorrectly reflects a strike conviction for "assault w/deadly weapon."

The People concede the restitution fine issue and the error in the abstract. We accept the People's concessions, modify the judgment accordingly and direct the trial court to correct the abstract of judgment. We also modify the judgment with respect to presentence custody credits. In all other respects, we affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

*Case No. 06M12710*

On November 1, 2006, following dinner with his girlfriend, Kym, and several guests, defendant became angry with Kym and punched her in the face several times. Kym's daughter, Tierra, tried to intervene on her mother's behalf, but was hit in the shoulder and the left eye by defendant.

On December 5, 2006, defendant was charged with misdemeanor battery of Kym (§ 243, subd. (e)(1) -- count one), and misdemeanor battery of Tierra (§ 242 -- count two). He pleaded no contest to misdemeanor assault with force likely to produce great bodily injury pursuant to section 245, subdivision (a)(1). On April 18, 2007, The court suspended imposition of sentence,

---

<sup>1</sup> Hereafter, statutory references are to the Penal Code unless otherwise indicated.

placed defendant on informal probation for three years subject to specified terms and conditions, ordered him to serve 60 days in county jail, and imposed fees and fines, including a \$200 restitution fine (\$ 1202.4).

*Case No. 08F01250*

On February 10, 2008, during an argument, then 38-year-old defendant hit his 52-year-old girlfriend, Evon, as she sat in a chair, and then continued to hit her in the face, eventually knocking out one of her teeth. As Evon left the home, defendant yelled, "I'm gonna fuck up everything." Evon returned shortly thereafter to find several personal items broken and her waterbed punctured and leaking.

On February 20, 2008, defendant was charged with unlawful use of force resulting in serious bodily injury (§ 243, subd. (d) -- count one), and misdemeanor battery of Evon (§ 243, subd. (e)(1) -- count two). The complaint alleged that, during commission of count one, defendant personally inflicted great bodily injury within the meaning of section 1192.7, subdivision (c)(8). Defendant pleaded no contest to count one as a non-strike offense pursuant to section 245, subdivision (a)(1). On March 26, 2008, the court placed defendant on formal probation for five years subject to specified terms and conditions, and ordered him to serve 120 days in county jail and to stay away from the victim. The court also imposed fees and fines, including a \$200 restitution fine (\$ 1202.4).

*Violation of Probation in Case No. 08F01250*

On June 25, 2008, the People filed a petition alleging defendant violated probation in case No. 08F01250 by possessing drug paraphernalia (Health & Saf. Code, § 11364). The petition was dismissed at a subsequent hearing.

*Case No. 08F04907*

On June 9, 2008, during an argument, defendant hit his girlfriend, Evon,<sup>2</sup> twice behind her left ear with a closed fist, and then jumped on the couch on top of her. Evon's daughter tried to intervene by jumping on defendant's back and putting her arm around his neck. Defendant bit Evon's shoulder. He then took some lighter fluid and matches and told Evon and her daughter he was going to burn the house down with Evon in it.

On August 4, 2008, defendant was charged with corporal injury to Evon (§ 273.5, subd. (a) -- count one), misdemeanor disobeying a court stay-away order (§ 166, subd. (a)(4) -- count two), misdemeanor battery of Evon (§ 243, subd. (e)(1) -- count three), and misdemeanor defacing with graffiti (§ 594, subd. (a)(1) -- count four). Defendant pleaded no contest to count one. On October 17, 2008, the court placed defendant on formal probation for five years subject to specified terms and conditions, and ordered him to serve 300 days in county jail.

---

<sup>2</sup> Evon later reported that she and defendant were married on July 18, 2008.

*Violation of Probation in Case Nos. 06M12710, 08F04907, and 08F01250*

On November 28, 2008, having recently been released from jail after serving time for domestic violence against Evon, defendant grabbed Evon's throat and choked her during an argument. Defendant told Evon, "I will kill you, your family, and your friends." When Evon tried to leave the apartment, defendant prevented her from doing so. During an argument two days later, as Evon was recovering from shoulder surgery, defendant grabbed Evon's fingers and twisted them, causing pain to her shoulder.

On December 8, 2008, defendant was arrested in connection with the November 28, 2008, and November 30, 2008, domestic violence incidents. Defendant became agitated and hostile at the scene of the arrest and became increasingly so on the way to jail. Upon arrival at the jail, defendant told one of the arresting officers, "it wouldn't be hard to find [him]" and threatened to "smash [his] brain."

On December 22, 2008, the People filed three petitions alleging defendant violated probation in case Nos. 06M12710, 08F04907, and 08F01250 by committing two batteries on his spouse and making criminal threats on three separate occasions. Following a contested hearing on March 6, 2009, the court sustained the allegations in each of the three petitions, denied probation and sentenced defendant to the upper term of four years in state prison on case No. 08F04907, a concurrent state prison term of four years in case No. 08F01250, and a

consecutive term of 180 days in county jail in case No. 06M12710.<sup>3</sup>

The court imposed fees and fines in each case, including restitution fines as follows: a \$200 restitution fine pursuant to section 1202.4 in case No. 08F01250; a \$200 restitution fine pursuant to section 1202.4 in case No. 08F04907; and a \$100 restitution fine pursuant to section 1202.4 in case No. 06M012710.

The court awarded defendant presentence custody credit as follows: 300 days in case No. 08F04907; 120 days in case No. 08F01250; and 110 days in case No. 06M12710. The 110 days of custody credit awarded in case No. 06M12710 represents the time defendant spent in custody awaiting the hearing on the petitions for violation of probation.

Defendant filed a timely notice of appeal.

#### DISCUSSION

##### I

Having previously imposed restitution fines pursuant to section 1202.4 in each of the three cases, the trial court, following revocation of probation, imposed additional restitution fines pursuant to that statute in all three cases. Defendant contends and the People concede that, pursuant to our holding in *People v. Chambers* (1998) 65 Cal.App.4th 819, 822-823, when a defendant is placed on probation and the court

---

<sup>3</sup> The court terminated probation in case No. 06M12710.

imposes a restitution fine pursuant to section 1202.4, the court has no authority to impose a second restitution fine following revocation of probation. We agree.

Here, the court placed defendant on probation in case Nos. 06M12710, 08F04970 and 08F01250. In each case, a \$200 restitution fine was imposed pursuant to section 1202.4. Upon revocation of probation, the trial court imposed a second restitution fine in each of the three cases. The trial court was without statutory authority to impose the second restitution fines, which must therefore be stricken. (*People v. Chambers, supra*, 65 Cal.App.4th at p. 823.) We will modify the judgment accordingly.

## II

Defendant was arrested on December 8, 2008, for the conduct alleged in the petitions for violation of probation. The court sustained the petitions and sentenced defendant on March 27, 2009, resulting in 110 days of presentence custody. The trial court applied those custody credits to misdemeanor case No. 06M12710, but not to the two felony cases.

Defendant contends the 110 days of presentence custody credit should have been applied to the two felony cases as well because, “‘but for’ the same conduct that led to the instant sentence, he would have been free of custody.” We agree.

Section 2900.5, subdivision (a) provides that for all felony and misdemeanor convictions, the defendant shall receive credit against his sentence for all days spent in custody, including presentence custody. However, “credit shall be given

only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted.” (§ 2900.5, subd. (b).) “The conduct for which a person ‘has been convicted’ and upon which sentence is imposed in a probation violation case is the criminal conduct for which probation had been ordered.” (*People v. Ross* (1985) 165 Cal.App.3d 368, 372.)

“[W]here a period of presentence custody stems from multiple, unrelated incidents of misconduct, such custody may not be credited against a subsequent formal term of incarceration if the prisoner has not shown that the conduct which underlies the term to be credited was also a ‘but for’ cause of the earlier restraint.” (*People v. Bruner* (1995) 9 Cal.4th 1178, 1193-1194 (*Bruner*).) The burden is on the defendant to establish his entitlement to presentence custody credit. (*People v. Shabazz* (2003) 107 Cal.App.4th 1255, 1258 (*Shabazz*).)

Here, the conduct for which defendant “has been convicted,” and for which probation was ordered, was misdemeanor assault with force likely to produce great bodily injury (in the misdemeanor case), and unlawful use of force resulting in serious bodily injury and corporal injury to a cohabitant (in the two felony cases). The custody for which credit is at issue is the time defendant spent in jail awaiting a hearing on the alleged probation violations. That custodial time is therefore attributable to proceedings related to the conduct for which



defendant was convicted, as required by section 2900.5, subdivision (b).

More important, perhaps, is the fact that there were no new charges filed as a result of the offenses giving rise to the petitions. As a consequence, defendant would not have been in custody for the 110-day period in question "but for" the conduct that led to the sentences in the three cases for which he was on probation.

Defendant has met his burden to show he is entitled to 110 days of presentence custody credit not only in the misdemeanor case, but also in the two felony cases, and we will modify the judgment accordingly.

Pursuant to this court's miscellaneous order No. 2010-002, filed March 16, 2010, we deem defendant to have raised the issue (without additional briefing) of whether amendments to Penal Code section 4019, effective January 25, 2010, apply retroactively to his pending appeal and entitle him to additional presentence credits. As expressed in the recent opinion in *People v. Brown* (2010) 182 Cal.App.4th 1354, \_\_\_\_ [p. 24], we conclude that the amendments do apply to all appeals pending as of January 25, 2010. Defendant is not among the prisoners excepted from the additional accrual of credit. (Pen. Code, § 4019, subds. (b)(1) and (c)(1); Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50.) Consequently, defendant having served 110 days of actual presentence custody, is entitled to 110 days of conduct credits, for a total of 220 days of presentence custody credits.

### III

Defendant contends, and the People concede, that the abstract of judgment must be corrected to reflect a conviction for assault with force likely to produce great bodily injury, a non-strike offense. Again, we agree.

Defendant was charged in case No. 08F01250 with unlawful use of force upon the victim resulting in great bodily injury (§ 243, subd. (d) -- count one) and misdemeanor use of force against someone with whom defendant had a dating relationship (§ 243, subd. (e)(1) -- count two). Defendant pleaded no contest to count one pursuant to section 245, subdivision (a)(1), as "a felony, but ... not [as] a strike." In other words, defendant pleaded no contest to "assault upon the person or another . . . by any means of force likely to produce great bodily injury" without admitting that he personally inflicted harm or that he used a weapon. Notwithstanding defendant's plea on the record, the abstract of judgment incorrectly reflects a conviction for "assault w/deadly weapon," a strike under section 245, subdivision (a)(1). We consider that to be a clerical error and, under our inherent power to correct such errors, we direct the trial court to amend the abstract to accurately reflect the true facts (*People v. Rowland* (1988) 206 Cal.App.3d 119, 123; *People v. Anthony* (1986) 185 Cal.App.3d 1114, 1125-1126), that is, to strike from the assault conviction the reference to "w/deadly weapon."

DISPOSITION

The judgment is modified by striking the \$200 restitution fine imposed in case No. 08F01250, the \$200 restitution fine imposed in case No. 08F04907, and the \$100 restitution fine imposed in case No. 06M012710. The \$200 restitution fines originally imposed in each of those three cases remain in force. The judgment is further modified to provide that defendant is given credit in case Nos. 08F01250 and 08F04907 for 110 days of actual custody prior to sentence and 110 days of conduct credits, for a total of 220 days of presentence custody credits. The trial court is directed to correct the abstract of judgment to indicate the crime convicted of under count 1-b is "assault," and to remove "w/deadly weapon." As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment in accordance with this disposition and deliver it to the Department of Corrections and Rehabilitation.

\_\_\_\_\_  
NICHOLSON, J.

We concur:

\_\_\_\_\_  
SCOTLAND, P. J.

\_\_\_\_\_  
SIMS, J.